

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 89-285, 89-286

Decided October 16, 1990

Appeals from decisions of the State Director, Nevada, Bureau of Land Management, approving final plans for removal of excess wild horses in the Carson City, Battle Mountain, and Winnemucca Districts, Nevada, Bureau of Land Management. NV 03337 and NV N6-89-1.

Affirmed in part, and reversed in part.

1. Wild Free-Roaming Horses and Burros Act

The Board will set aside a BLM decision to remove wild horses from a herd management area where removal is not properly predicated on an appropriate determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

APPEARANCES: Nancy Whitaker, Animal Protection Institute of America, Sacramento, California, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Animal Protection Institute of America (APIA) has appealed from two decisions of the Nevada State Director, Bureau of Land Management (BLM), approving final plans for the removal of approximately 1,358 excess wild horses from certain areas of the public range situated within 11 designated herd management areas (HMA) in the Battle Mountain, Carson City, and Winnemucca BLM districts. These appeals were docketed as IBLA 89-285 and IBLA 89-286 and are hereby consolidated because they involve similar issues. 1/

1/ IBLA 89-285 involves APIA's appeal from the State Director's Jan. 3, 1989, approval of a final plan for the removal of 627 excess wild horses from the Augusta Mountain, Lahontan, Horse Mountain, Dogskin Mountain, and Granite Peak HMA's in the Carson City, Battle Mountain, and Winnemucca Districts in conformance with the Lahontan Resource Management Plan. IBLA 89-286 involves APIA's appeal from the State Director's Jan. 9, 1989, approval of a final plan for the removal of 731 excess wild horses/burros from the Goldfield, Lone Mountain-Paymaster, Montezuma Peak, Stonewall,

In its statements of reasons (SOR) for the two appeals, APIA questions the justification of the BLM decisions to remove wild horses from the public lands in these HMA's on four basic points. First, it charges that the decisions to remove wild horses are improper because the numbers listed in the land use plans are not the "appropriate management level (AML)" because the numbers used for the AML in the plans are arbitrary figures not based on range data. Second, it refers to arguments it has raised in other wild horse appeals, charging that BLM failed to properly determine that there is an excess number of wild horses in each area of the public range, and that removal is necessary in order to achieve a thriving natural ecological balance of the natural system and prevent a deterioration of the range caused by that excess. Next, it asserts that BLM has not acted properly to establish the AML's and to properly determine whether excess numbers of horses exist on the public range in accordance with the requirements of the Wild Free-Roaming Horses and Burros Act (the Act), as amended, 16 U.S.C. § 1333(b)(2) (1982). APIA contends that the removal plans fail to meet the National Environmental Policy Act requirements in that the decisions did not assess the environmental consequences of the actions to be taken. APIA criticizes the programmatic environmental assessments (EA) involved, charging that the documents were limited to how the horses would be removed rather than whether they should be removed. APIA charges also that the BLM actions do not comply with the criteria for removal set forth in the district court's ruling in Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984), i.e., to achieve a thriving ecological balance of the natural system.

As to the Augusta Mountain HMA, although APIA notes that the removal plan "seemingly meets all four points" it also notes that the plan includes

fn. 1 (continued)

Bullfrog, and Gold Mountain HMA's in the Battle Mountain District in conformance with the Shoshone-Eureka Resource Management Plan, the Tonopah Management Framework Plan, and the Esmeralda-Southern Nye Resource Management Plan. The following is a listing of the HMA's involved herein, along with the appropriate management level (AML), current horse/burro population, and the number of wild horses/burros intended to be removed in each case.

<u>HMA</u>	<u>AML</u>	<u>Population</u>	<u>Removed</u>	<u>Burro</u>	<u>to be</u>	
Augusta Mountain	160	980	347	Lahontan	42	172
130						
Horse Mountain	63	134	71			
Dogskin Mountain	19	64	45			
Granite Peak	17	51	34			
Lone Mountain-Paymaster	48	196	148			
Montezuma Peak	161	234	73			
Goldfield	227/71	597/52	370/0			
Stonewall	13/34	85/18	72/0			
Gold Mountain	19	49	30			
Bullfrog	12/218	0/256	0/38			

only range data for the southern one-third of the HMA. Therefore, APIA asserts that the plan lacks the proper information to evaluate the need for removal of horses from the entire HMA and argues that other options have not been considered.

Finally, APIA contends that BLM is required to prepare a herd management area plan (HMAP) prior to the removal of any wild horses from an HMA.

BLM has responded, filing requests to consolidate both these appeals with several other appeals by APIA docketed as IBLA 88-591, IBLA 88-638, IBLA 88-648, and IBLA-679. Although BLM has not filed a detailed response in these cases, it essentially relies on the same arguments raised in the prior appeals, maintaining the issues are identical to the issues raised by APIA in the earlier cases.

As BLM has indicated, the four prior appeals cited for consolidation do involve the same basic questions regarding whether BLM properly determined that there is an excess number of wild horses in other areas of the public range and whether the removal of wild horses is necessary in those same areas. However, those cases were previously consolidated for administrative convenience and considered by the Board in Animal Protection Institute of America (APIA), 109 IBLA 112 (1989).

[1] We have reviewed the current cases at issue in relation to our determination in the earlier APIA cases and note that our rationale and discussion of the pertinent law in APIA, supra, is dispositive of the issues raised by APIA herein. Nothing has been presented with these two appeals to persuade us that our determination in the prior cases is not directly applicable to BLM's actions in the HMA's under review in the current cases. 2/ Accordingly, consistent with our ruling in APIA, supra, as

2/ On July 6, 1990, APIA filed an additional inquiry regarding the status of these appeals, requesting a remand of these cases back to the BLM District Offices involved and requesting the Board to issue a ruling on BLM's procedure for emergency removals. APIA notes that an emergency removal of 305 horses from the Goldfield HMA was completed June 28, 1990, and maintains that "far too many" horses were removed than was necessary under the circumstances and that this situation demonstrates the need to establish safeguards for removals in those instances where emergencies exist (Request 8-9).

APIA has requested the Board to issue a ruling on criteria for emergency removals, which was not an issue presented in the appeals under consideration. What criteria to apply is a matter for BLM to decide initially as a matter of policy. Until facts giving rise to a decision which is appealed to this Board present the full merits of such issue for our consideration, the Board will not make a ruling that is merely an advisory opinion. In Headwaters, Inc., 101 IBLA 234, 239 (1988), the Board reemphasized that it does not issue advisory opinions stating:

to those HMA's that did not involve removal actions which were placed in full force and effect, 3/ the removal actions challenged by APIA cannot be sustained, and further evaluation and documentation must be undertaken to support the removal actions consistent with the intent of the law.

Generally, the BLM actions challenged by APIA would remove wild horses from areas not designated for wild horse management and would return the number of wild horses within HMA's to the AML's established in land use planning decisions adopted for those areas. All of the BLM removal actions were accompanied by a site-specific or programmatic EA, which analyzed the environmental consequences of removing wild horses from the public range and a no action alternative.

Section 3(b)(2) of the Act provides the statutory authority for the removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that, where the Secretary of the Interior determines on the basis of information available to him

that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken * * * until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1982). "[E]xcess animals" are defined in the statute as wild free-roaming horses and burros "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1982).

As the court stated in Dahl v. Clark, supra at 594, the "benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." In the words of the conference committee which adopted this standard: "The goal of wild horse and burro

fn. 2 (continued)

"In State of Alaska, 85 IBLA 170, 172 (1985), the Board observed that it 'does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction.'"

Moreover, the Board stated that its duty is "to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions."

3/ In an order dated Feb. 16, 1989, pursuant to a request by BLM, the Board placed removal actions into full force and effect with respect to the Buffalo Hills, Desatoya, New Pass/Ravenswood, and Buck and Bald HMA's because the record established that removal was "necessary because the four HMA's are either currently experiencing resource damage or there is a significant threat of such resource damage such that immediate removal of wild horses is warranted."

management * * * should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation

of wild horses and burros." H.R. Conf. Rep. No. 1737, 95th Cong., 2d Sess. 15 (reprinted in 1978 U.S. Code Cong. & Admin. News 4069, 4131). 4/

Using this test, as we did in the earlier APIA decision, we again must conclude that BLM has not established that removal is warranted in order to restore the range to a thriving natural ecological balance and prevent a deterioration of the range threatened by an overpopulation of

wild horses. We, therefore, reverse the BLM removal actions with respect to all the HMA's in question, with the exception of the Augusta Mountain HMA. As to that HMA, APIA recognizes in its SOR that adequate information may have been gathered to document the BLM removal action. Although it challenges the removal action on other grounds, we find adequate documentation in the record to sustain this removal action consistent with the above-stated requirements to protect the range from further deterioration.

As with the earlier APIA challenges to BLM removal actions, the actions in question herein were generally designed to return the number of wild horses within each HMA to an AML. We examined BLM's general method for establishing AML's at great length in APIA, supra, and discussed the framework for how these numbers evolved. Our discussion in APIA, supra at 115-19, regarding BLM's approach and how its horse removal calculations for administrative convenience have not complied with the requirements of the law is similarly controlling in the instant cases.

Our review of the records in these current appeals indicates that the BLM removal actions are predicated on returning the number of wild horses within the subject HMA's to the AML's that were established in the Lahontan Resource Management Plan, the Shoshone-Eureka Resource Management Plan, the Tonopah Management Framework Plan, and the Esmeralda-Nye Resource Management Plan based on the levels of wild horse use in 1981 or 1982 and 1986. These AML's were originally established for administrative convenience, rather than based on a determination of the optimum number of wild horses which would maintain the range in a thriving natural ecological balance and avoid a deterioration of the range. Since that time, except for the Augusta Mountain HMA, there is no evidence that BLM has engaged in any range assessments adequate to allow BLM to conclude that returning the numbers of wild horses to these AML's would achieve that optimum number of wild horses.

The EA's involved herein generally do not serve that purpose. As with our findings in our previous consideration of the earlier APIA cases, BLM's discussions in the EA's do not indicate in any respect the current condition of the range or how that condition will be affected by the removal (or lack

4/ Departmental regulation 43 CFR 4700.0-6(a) states that wild horses and burros "shall be managed as self-sustaining populations of healthy animals in balance with other uses and the productive capacity of their habitat."

of removal) of wild horses such that we may judge whether removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range. There are only references in the EA's to the anticipated effect of removal or lack of removal of wild horses on the condition of the range.

The Augusta Mountain EA is the exception to the others in the group in that there has been an obvious attempt to balance and improve the ecological condition of the range and still provide adequate forage for both horses and livestock. The EA provides an analysis of the most recent ecological condition and ratings of the key grass species taken in November 1988. The analysis refers to monitoring of the total use of the range over a 2-year period and clearly does not recommend the optimum number of horses based on an arbitrary figure developed primarily as a starting point for administrative convenience.

We find that, aside from the Augusta Mountain EA, there is no definitive, well documented statement in the EA's that removal is necessary to restore the public range to a thriving natural ecological balance and prevent a deterioration of the range threatened by an overpopulation of wild horses. Therefore, we conclude that, with the exception of the Augusta HMA, there is no evidence that the numbers of wild horses in the subject HMAs must be returned to the established AML's in order to now restore these areas to a thriving natural ecological balance and prevent a deterioration of the range.

Although APIA admits that BLM has provided some documented basis for its removals in the Augusta Mountain HMA, it still rejects the use of the numbers as developed in this HMA because it contends that the number developed for the AML is invalid since the data relates only to the southern third of the area which coincides with the Hole in the Wall Allotment. We have reviewed BLM's figures for this area and find that there is adequate support in the record consistent with the requirements of the law to sustain the need for the intended removal.

APIA has also asked the Board to rule that the BLM removal actions were improper in the absence of preparation of an EA which assessed the environmental consequences of removing wild horses from the public range, rather than the implications of using alternative methods of removal. We do not agree that BLM failed to execute the necessary EA's. In conjunction with each of the removal plans, BLM prepared an EA. These EA's assessed the environmental consequences of removing wild horses from the public range and a no action alternative. APIA has demonstrated no particular deficiency in preparation of the EA's, and we can discern none.

Finally, APIA contends that BLM should not be permitted to proceed with removal of wild horses from the HMA's involved herein until it has prepared an HMAP in each case. We specifically considered and rejected this same argument in APIA, supra at 127, and adhere to our initial finding.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part and reversed in part.

John H. Kelly
Administrative Judge

I concur:

David L. Hughes
Administrative Judge
